Pragmatism, Law and Governmentality

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Styles of Pragmatism, Social Science and the Law

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I have long held as an ideal the words of one of foremost American interpreters of John Dewey's philosophy: "An adequate, comprehensive political and social theory must be at once empirical, interpretive, and critical."[1] How these styles of social inquiry, whose practitioners often seem at war, might cohere has never been completely clear. This essay is an attempt to work out in a very limited context some of the issues surrounding these relationships. In particular, I want to explore the relationship between the interpretive style, which I take to be central, and the other two.[2] The focus of these remarks is my recent attempt to give a reasonably adequate account of an important institution, the American trial. I say "institution" out of deference to ordinary academic usage, though from the start I thought that the trial would best be understood not primarily as an institution but as a set of linguistic and dramatic practices. I wanted to begin that effort not with an abstract account of the rules of the trial, as would the doctrinal tradition, or with largely statistical data on the trial, as might mainline political science, or the results of experiments concerning "jury behavior," as have the enormous number of social scientific accounts, or with a normative-conceptual account of the place

[1] Richard J. Bernstein, *The Restructuring of Social and Political Theory* (Philadelphia: University of Pennsylvania Press, 1976), xiv.

[2] I will take the early Rawls as my primary example of a critical theorist, that is, a philosopher who at least aspires to invoke a principle that is not in an obvious way derived from or immanent in the social practices he studies, for the purpose of criticizing those institutions. Habermas is the example that Bernstein usually invokes. Despite their enormous differences, Rawls and Habermas are similar in relying on a principle that in some ways transcends the practices of a given society.

of the trial within accepted notions of the rule of law, as would the mainlines of Anglo-American jurisprudence. Though my background is in philosophy, I was especially wary of the latter, heeding one scholar's account of Hannah Arendt's work:

> [E]ven when philosophy seemed to turn to an examination of politics, it embraced a conceptualism which disdained any serious phenomenological examination of political experience itself. The themes of this political thought were the abstract concepts of liberty, the state, right, sovereignty, and so forth….It was not surprising that political thought became an academic exercise, shedding no light on the political realities of actual life; philosophers set the direction for political thought and not thinkers writing out of their involvement in politics. Finally, the impoverished realm which philosophers understood as political led them to concentrate their attention on the formal structure of the state and the issue of ruling. Their questions were asked from the perspective of the government and not from that of the citizen.[3]

I wanted, instead, to begin with the *experience* of the trial, with what might be called a radical empiricism. In particular, I wanted to begin with a kind of epiphany that occurs at trial, one that I had experienced and which jurors often describe, often in a somewhat startled style, as if to say, "I didn't realize that we had this kind of capacity!" This understanding of the people and issues being tried has a kind of austere power. It is experienced as elevating the participants. The understanding has a kind of lucidity of which it is very hard to give an account and seems to involve a literally indescribable grasp of what we usually call facts, norms, and possibilities for action. It is true that the doctrinal tradition calls juries[4] "finders of fact" and there have been, historically, sometimes resolute and more usually half-hearted attempts to enforce this model of the jury's role. Most participants have long understood that this was very poor way to describe the event of a trial and that much more was afoot than the construction of a

[3] James Bernauer, "On Reading and Misreading Hannah Arendt," *Philosophy and Social Criticism* 11 (1985): 11.

[4] I will refer to the decision-maker at trial as "the jury" throughout. Usually, it doesn't matter whether the decision-maker is a judge or a jury.

value-free narrative of events built up the purely empirical generalizations that inhabit the jury's common sense, its "web of belief." To anticipate, what actually occurs is better described as what Richard Dreyfus calls a form of "practical holism." The jury does not primarily construct. It primarily integrates and interprets. It integrates the (1) narrativized purposes of the participants with (2) the "brutally elementary data"[5] revealed during the evidentiary stage with (3) an interpretation of the meaning of those events with (4) the practical options it has for decision. It does not produce a screen-play of past events available for "theoretical" contemplation. It is a practical enterprise where the questions, "What does this mean?" and "What can we do?" are codetermining.

What kind of knowledge is the most adequate kind of knowledge of the practices at occur at trial—the linguistic practices of the witnesses, lawyers, judge, and jurors. Scientific knowledge is imaginable—indeed one of the most prominent of the students of the jury has spoken of the need for a "scientific image" of the juror. At its most ambitious, such a knowledge would correlate, perhaps only statistically, dependent variables with independent variables under scientific covering laws. In creating a scientific image of the mind of the juror as an information processor, it would replicate its own method as normative for what it studies. It would do for the trial what a very strong program in the sociology of science would accomplish, create a science of science. Such an enterprise would not, however, give an account of the validity of science, just as a scientific account of the trial would not give an account of the validity of the trial. For that one would need a "rational reconstruction," an account of how the practices of science actually accomplish their human purposes. To put it another way, it would

[5] Hannah Arendt, "Truth and Politics" in *Between Past and Future* (New York: Penguin Books, 1977).

provide an account of how science achieves its own internal purposes. Or, to use more traditional language, it would explain by formal, not efficient causes.

I argued, by contrast, that the kind of knowledge that would be most adequate to the trial would resemble what Arendt said about political understanding generally, that it would deploy "a style of 'attentiveness to reality' that is more the mark of the political actor than a scholar," because "political understanding relates more closely to political action than to political science."[6] The most adequate knowledge would be akin to the kind of knowledge that a reflective practitioner might have, "finding a footing" or "finding one way around."[7] In particular, the most adequate knowledge of the trial would have to be fair to, indeed would have to be an interpretation of, the experience of the trial's power to reveal. This could not be done by comparing the understanding revealed by the trial to another understanding, and certainly not a scientific understanding, that would provide independent criterion of validity. The traditional mimetic theory of drama provides an analogy:

> Works of art are not reproductions of a reality that can be identified independently of the work of art and used to judge the adequacy of its representation; rather, the features of the objects works of art represent…are illuminated only by means of the representation itself; certain events or features are exaggerated, the importance of others minimized and the like. Hence the representation does not provide a mirror to reality that exactly reflects it; rather on Gadamer's view, artistic presentation shows the "truth" of "reality," as he puts it. "Reality" is defined as what is untransformed and art as the raising up of this reality into its truth…[8]

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[6] David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994): 206.
[7] Herbert Dreyfus, "Holism and Hermeneutics," *Review of Metaphysics* 34 (1980): 12. The first phrase is Heidegger's, the second Wittgenstein's.
[8] Warnke, *Gadamer: Hermeneutics, Tradition and Reason,* 57.

The play (and the trial) provides knowledge insofar as it "show us something familiar, as something we knew or should have known….something we could not see without it; yet having seen it, we recognize it as a crucial aspect of what we always saw."[9]

Heideggerian Pragmatism and Hannah Arendt's "Thinking What We Do"

The Formalist Background to Heidegger and Dewey.

One of the reasons by *Being and Time* burst upon the European intellectual scene so powerfully was that it provided some path for a rapprochement with pragmatism. Both Dewey and Heidegger were powerfully influence by Hegel. Consistent with that influence, they were both suspicious of formalisms. In Dewey's case, the formalism in question was associated with formal logic, and he argued strenuously for a "material logic." Such a logic would move forward by "dipping down" into the concrete through usually reformist action, broadly analogized to scientific experiment. It would not proceed by purely analytic relations among propositions whose content was irrelevant. (For Heidegger, formalism was represented by the Neo-Kantianism that dominated German universities into the twenties.)

Nonformalist philosophers with a material logic tend to be conservatives in one sense. Hegel was suspicious of moral ideals "floating in from who knows where," and so subordinated the abstract morality of rules, which he called *Moralitat* and associated with a major thread in Kant's philosophy, to the concrete norms of a functioning society,

[9] *Id.* at 59.

which he called *Sittlickheit*.[10] To Kant's vigorously normative philosophy, he replied, "The Owl of Minerva takes flight only at dusk. Philosophy always comes too late." Philosophy's task is to give an account of this *Sittlichkeit*[11] not to legislate to existing societies how they are to rule themselves. It is debated by among Hegel scholars the extent to which one can fairly speak of an Hegelian philosophical "ethics" and in particular whether or not philosophy has any critical edge, any ability to transcend the limitations of the norms embedded in the current practices and institutions of the society. Dewey's early Hegelianism reappears in his aversion to utopian thinking, his insistence that the way forward was through resolving problematic situations by actualizing and organizing the actual resources of the existing society. Though neither Hegel nor Dewey would be wholly pleased with this characterization, Hegelianism and pragmatism can be understood as within the romantic reaction against early "Newtonian" ideals of society and of social science (both of which remain alive and well). Hegel was a "conservative" in comparison to what he considered the destructive abstractions of the French Revolution. Dewey could be a "progressive" because he would analogize social inquiry to scientific method where reform was a kind of experiment in the interest of resolving problematic situations and achieving a satisfying and comprehensive integration of experience. Action was a moment in the achievement of knowledge.[*] Heidegger, of course, was never a progressive.

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[10] The *locus classicus* is Creon's lament at the end of the *Antigone*, where an unmediated clash of absolutes has lead to death and misery.

[11] John Rawls development from *A Theory of Justice* to *Political Liberalism* can be understood as a movement from a more Kantian to a more Hegelian understanding of the task of philosophy. I have heard Jurgen Habermas, for whom it is crucial *for the theorist* to maintain a principled critical stance, decry this development as a falling away from the task of philosophy.

[*] Final version will have a fuller account of Dewey's account of the relationship between common sense and science and of social inquiry in his 1938, *Logic: The Theory of Inquiry*.

Indeed Dewey's pragmatism served to "recover" the normative side of traditional, perhaps Aristotelian philosophy (in either its Thomistic or left Hegelian modern incarnations), in a very changed social and intellectual world. (Heidegger began as a Thomist and Dewey as an Hegelian.) Many of Dewey's efforts can be understood has translating left Hegelian insights into a post-Darwinian "biological" set of metaphors and trying to assimilate social knowledge to a model of "scientific" inquiry. In the context of social studies, that meant making sense of a notion that there were rational approaches to reform. Aristotle's argument that a mixed regime was the best polity, and that some things were better "by nature" and not just by custom had become rather frayed by the end of the modern age.[12] During the long centuries of feudalism and absolutism, the forms of social and political organization were often thought to be largely "beyond good and evil" (and also beyond reason) in the sense that ordinary moral intuitions did not apply here. Fate or tradition or providence or God's will determined the shape of political and social institutions. British political economy after Adam Smith, who was a more complex figure, tended to conceive of many of the more important social institutions as governed by iron laws that could not be known "scientifically" but could not be disobeyed. Bentham's efforts, which began with an broadside against Blackstone's natural law-traditionalist defense of the Common Law of England,[13] were attempts to find a normative principle that would apply *both* to individual morality and also to the shape of public institutions. (David Luban has argued persuasively that what defines

[12] There were threads of Aristotle's *Politics* that suggested that there were no distinctively political or social norms that could adjudicate philosophically among regimes, that all political values were internal to regimes among which only civil war could adjudicate. Arendt argued vigorously that the category of "the natural" had lost all normative meaning in modernity.
[13] Jeremy Bentham, *The Mysterious Science of the Law.*

"legal modernism" is precisely the uncomfortable recognition that we are responsible both for doing justice and for the shaping of the institutions through which we do justice.)

(For Dewey, as more recently for Alasdyre MacIntyre, one mode of social criticism involved distinguishing between *practices* and the institutions within which they were encased. A practice could be healthy, yet the institution that surrounded it could distort it. For my inquiry, this suggested that what was wrong with the trial was a function of the distortions imposed by the institutional ("bureaucratic" and "market") systems within which this practice occurred. Thus bureaucratic rules limited discovery in criminal cases in ways that led to false convictions and, as rules of evidence, denied to juries the means by which to reach fair decisions. The market system denied to people of modest means access to the legal services that would allow them to participate effectively in the trial. This would seem to require gaining an understanding of the practice in a somewhat idealized manner, somewhat abstracted from the way many trials actually functioned.)

There already existed an account of the trial as an institution, what I called "the received view" of the trial. In this view, a trial was an institutional device for realizing the rule of law where there were, unfortunately, disputes of fact. The Anglo-American scholars who wrote in what is sometimes called the rationalist tradition in evidence law often thought evidence law was an organon, analogous to scientific method, by which the highest possible factual accuracy could be achieved at trial and non-legal moral or political influences screened out. The construction of a value-free purely factual

narrative would be followed by an effort of fair categorization, in which the accurate account of what occurred would be compared with the legal rules embedded in the jury instructions to produce a lawful result. Justice Scalia celebrated this form of the rule of law as the law of rules. The legitimacy of the result was positivist and bureaucratic—it directly expressed, at the ideal level, the power of the will of the people expressed through democratically enacted law, and, at the less than ideal level, whatever sources of power could determine the products of legislative efforts.

The method I employed to illuminate the experience of the trial's power is what Arendt called "linguistic phenomenology." It involves a careful attention to the details of the way language is actually used at trial, from within the perspectives of those who speak. The trial is, after all, a complex linguistic practice, a "consciously structured hybrid of languages." Although she would certainly not accept the designation "pragmatist," Arendt consistently opposed the primacy of theory over action. Though she occasionally attacked scientism, the theory that drew most of her fire was Hegel's, and, derivatively, Marx's. For Arendt, Hegelianism was a profoundly contemplative philosophy. Its goal was theoretical reconciliation. It was this contemplative stance that stood, in Arendt's view, to undermine the primacy of the practical. Explanation surreptitiously eliminates the possibility of freedom and of the experience of meaningfulness that it brings.. The form of practice that she was most concerned with was political action. For Arendt, political action was the "lost treasure" of the revolutionary inheritance, a capacity that could bring forth on earth something "genuinely new." Political action, understood from within, also had the capacity to make human life

meaningful, to save us from the "worldlessness" that accompanied the bureaucratic cruelties of the "onslaught of modernity."[14] It would save us from the endless instrumentalization that characterized the language region of *homo faber*, the maker of stable wordly structures, including the world of legal doctrine. Linguistic phenomenology would manifest "language regions" that were truly irreducible to one another.[15] It could also allow us to recover the experiences that lay deep within our ways of speaking, experiences that were often encased in a theoretical overlay. Ultimately, she would argue there was no theoretical reconciliation of spheres within the human condition.

What understanding of philosophy supports Arendt's method? I want to suggest that Arendt's understanding of linguistic phenomenology may have emerged from her exposure to Heidegger's struggle to move phenomenology away from Husserl's fundamentally theoretical ideal of philosophy. In his magisterial account of the intellectual genesis of *Being and Time*, Theodore Kisiel recounts Heidegger's breakthrough to a fundamentally pragmatic understanding of philosophy that would allow him to provide, some years later, an understanding of man as a practical being whose coping skills constituted his basic form of understanding;

> *Philosophy is not theory* outstrips any theory or conceptual sys tem it may develop, because it can only approximate and never really comprehends the immediate experience it wishes to articulate. That which is nearest to us in experience remains farthest removed from our comprehension. Philosophy in its "poverty of thought" is ultimately reduced to maintaining its proximating orientation toward the pretheoretical origin which is its subject matter. Philosophy is accordingly an orienting comportment (*Verhalten*), a praxis of

[14] Hannah Arendt, *On Revolution*, 196.
[15] For the notion of "language regions," *see* Hanna Fenichel Pitkin, *Wittgenstein and Justice* (Berkeley, University of California Press, 1972).

> striving, a protreptic encouraging of such a striving. Its expressions are only "formal indications" which smooth the way toward intensifying the senses of the immediate in which we find ourselves. It is always precursory in its pronouncements, a forerunner of insights, a harbinger and hermeneutic herald of life's possibilities of understanding and articulation. *In short, philosophy is more a form of life on the edge of expression rather than a science.* That phenomenology is more a preconceptual, provisory comportment than a conceptual science, that the formally indicating "concepts" are first intended to serve life rather than science, becomes transparent only after the "turn." [16]

Heidegger framed this notion of phenomenology as a nontheoretical science in struggling with the criticism that the neo-Kantian philosopher Paul Natorp brought against the very possibility of phenomenology as a method to "get at and articulate the pretheoretical realm of life in a pretheoretical way." Natorp had urged against Husserl that it is impossible to give an account of the living source of subject and object without imposing an objectivizing theoretical grid on it, "acting as a theoretical intrusion which interrupts the stream and cuts it off."[17] "For in reflection the life-experiences are no longer lived but looked at. We ex-posit the experiences and so extract them from the immediacy of experience. We as it were dip into the onflowing stream of experiences and scoop out one or more, which means that we 'still the stream' as Natorp says."[18] Natorp's second objection is that there is no description without the subsumption of the subject matter under general concepts, and so objectivization. Heidegger's response was to seek a "supratheoretical" solution to Natorp's challenge. In a step that was decisive for his entire philosophical life, he argued that "all our experiences, beginning with our most direct perceptions, are from the start already expressed, indeed interpreted….[I]n being

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[16]Theodore Kisiel, *The Genesis of Heidegger's <u>Being and Time</u>* (Berkeley: University of California Press, 1993). Wittgenstein put it this way: "The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes. …[W]e faile to be struck by what, once seen, is most striking and most powerful." And again, "Philosophy leaves everything the same."

[17] Kiesel at 48.

[18] *Id., quoting* notes to Heidegger's lecture courses for 1919.

already intentionally structured immediate experience is itself not mute but "meaningful," which now means that it is already contextured like a language."[19]

There was, then, a congruence between concrete experience and philosophy, understood as something other than theory. Common sense was not a set of beliefs, a kind of incomplete theory. Nor was philosophy theory. In *Being and Time*, Heidegger would say that our mode of being was understanding and understanding was interpretation. This understanding is not ultimately a grasp of facts, beliefs or rules:

> Heidegger has a more radical reason for saying that we cannot get clear about the "beliefs" about being we seem to be taking for granted. There are no beliefs to get clear about; there are only skills and practices. These practices do not arise from beliefs, rules, or principles and so there is nothing to make explicit or spell out. We can only give an interpretation already in the practices.[20]

This insistence that our understanding is primarily composed of coping skills that has led other scholars to call Heidegger a pragmatist.[21] And he would say about *Being and Time* that it was itself an interpretation, not the imposition of a formal theoretical structure on an object of knowledge. There was a continuity between what philosophy is and what experience is. Philosophy is an interpretation that allows us to cope. Philosophy is neither a scientific account of human behavior nor a normative theory that would provide a critical perspective from above the practices interpreted. And so Heidegger's concept of philosophy has been criticized as being at a fundamental level both relativist and amoral. As has Dewey's.

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[19] *Id.*
[20] Hubert L. Dreyfus, *Being-in-the-World: a Commentary on Heidegger's* Being and Time*, Division I.* (Cambridge: M.I.T. Press 1991), 22.
[21] Mark Okrent, *Heidegger's Pramatism: Understanding, Being, and the Critique of Metaphysics* (Ithaca: Cornel University Press 1988); Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press 1979).

Arendt often demurred at being called a "philosopher." She preferred the description "political theorist." But Heidegger's displacing of the theoretical is the background for Arendt's insistence on the primacy of the practical. She thought we could "read off" language uses in the various regions of the human condition the pretheoretical orientation of the speakers and so the irreducible "spirits" that animated the different spheres of the human condition. I will only mention what she thought she found in the legal world. I think it is fair to say that she found the legal world to be inhabited both by *homo politicus* and *homo faber*, by political speech and action and by a more instrumental style, largely in the interests of stability, of creating a "stable worldly structure" as a hedge against the worldlessness of ideologically driven political programs:

> The subtlety of her legal thought, however, lies in her account of the legal world, constitutional and legislative, as interpenetrated in different ways, at different points by the more "principled" realms of ethics, politics, and "fabrication." The legal world itself seems like an old city: "a maze of little streets and squares, of old and new houses. And of houses with additions from various periods; and this surround by a multitude of new boroughs and with straight regular streets and uniform houses." In some neighborhoods, we find "the processes of persuasion, negotiation, and compromise, which are the processes of law and politics" as well as the "actual content of political life – the joy and the gratification that arise out of being in the company with our peers, out of acting together and appearing in public, out of inserting ourselves into the world by word and deed…." Other boroughs, important though perhaps more somber, house, indifferent ways, "those things which men cannot change at will, which show that the political sphere, its greatness notwithstanding, is limited – that I does not encompass the whole of man's and the world's existence."[22]

One of the streams that has, in part, flowed from the Heideggerian notion that original experience is a already structured is the notion, shared by many different thinkers

[22] Robert Burns, "Hannah Arendt's Constitutional Thought," in *Amor Mundi: Explorations in the Faith and Throught of Hannah Arendt,* ed. James W. Bernauer, S.J. (Boston : Martinus Nijhoff Publishers 1987), *quoting* first Wittgenstein, then Arendt.

in a number of disciplines, that narrative forms the deep structure of human action. The bedrock of human events is not an undifferentiated prime matter onto which narrative categories are imposed, but a "configured sequence" with a narrative quality all the way down. Relying on Heidegger's analysis in *Being and Time*, David Carr[23] writes that to act at all is to anticipate a goal, and to organize means to achieve that goal—the source of the "beginning, middle, and end" of a well constructed story. Narrative structures "are to be found…in the midst of experience and action, not in some higher level linguistic reconstruction of the experiences and actions involved."[24] Stories "are told in being lived and lived in being told."[25]

I found in my phenomenology of the trial's linguistic practices that the trial proceeds by the construction and deconstruction of narrative and so "touches down" in the human things themselves. It achieves its power, I came to think, by the enormous tensions that are generated by this process and that impose a discipline for judgment and action. There are broad, highly interpreted narratives in opening statement where lawyers are free to propose "what this case is about," as trial lawyers put it or, as hermeneutical philosophers tend to say, what "as-structure" the event of the trial manifests itself within. These are the stories where American lawyers are relatively free to "narrativize" a broad range of values—moral, political, formal-legal. These narratives tend to be spun around a dominant norm that the lawyer is proposing "this case is about." They are in the sharpest tension with the narratives that form the major part of the evidentiary phase of the case, where the rules of witness examination force the witnesses to testify "in the

[23] David Carr, *Time, Narrative, and History* (Bloomington: Indiana University Press, 1986), 16-17.
[24] *Id. at 50.*
[25] Barbara Hardy, "Toward a Poetics of Fiction: An Approach through Narrative," *Novel* 2 (1968)

language of perception" and which inevitably contrasts with even the most careful and inspired opening statements. Each opening serves as a critique of the other. Each witness examination in its quite obsessive factual detail serves as a critique[26] of the values embedded in the opening statement, the range of valid application of every one of the norms embedded the openings. Cross-examination performs a range of critical functions with regard to the narratives of direct examination.

I argued that it was in the tensions among these forms of narrative and the attempts precisely to locate their meaning and adjudicate their relative importance that the practical truth of a human situation could emerge. It was "practical" truth because the epiphany that emerged at trial was about how to cope with the situation that had emerged through the construction and deconstruction of the narratives. The interpretation of the event is never embedded solely in one story. It could not be embedded in one story, because there always are two stories, and most usually, a good many more than two. There is no omniscient narrator, because the stories that we could tell are always limited. It is in our performances, our means of coping with what the construction and deconstruction of narrative illuminates, that we achieve a practical truth. Certainly the trial is a political forum. As Tocqueville told us, "The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated….He who punishes the criminal is…the real master of society."[27] But the "truth" that emerges at trial is not quite a political truth, because the trial bestrides a number of language regions which express themselves through the trial's consciously structured hybrid of languages.

[26] I mean critique in the Kantian sense, a method for determining the appropriate reach of kinds of generalizations.
[27] Alexis de Tocqueville, *Democracy in America*

The trial employs moral language and political language and also formal-legal language that functions largely instrumentally to maintain "legitimate expectations," that is to say, to maintain the worldly structure of the law. It says implicitly, like a critical philosopher, that there is no one perspective to which these different perspectives can be reduced.

I found that the method that served best to realize the most adequate knowledge of the trial used methods at the metalevel that were continuous with the methods used at trial. Several readers commented on the "reflexive" character of the argument. My method was primarily interpretive. As at trial, I hoped to convince by overall plausibility of the account I provided. I provided a quite detailed account of the rules that constrain and structure performances and the different linguistic performances themselves. I offered detailed descriptions and interpretations of aspects of the trial that could be "hidden because of their simplicity and familiarity." I offered empirical social scientific conclusions about the trial. I interpreted an opening statement given in a criminal case. Only then did I try to "think what we do" and provide a more recognizably philosophical account. Much like an extended closing argument. Although the book was called *A Theory of the Trial,* it wasn't really a theory at all. Just as the trial didn't need an Archemedian point from which to understand the event being tried, neither did we need an Archemedian point from which to understand the practices that constitute the trial.

Nor, to take the next step, do we generally need any such principle to make judgments about the basic structure of society. We do not need a Categorical Imperative or a Universal Class or Absolute Knowledge. Just as the trial can illuminate the practical

truth of a human situation by allowing the juror to dwell in the tensions among its linguistic performances and cope practically with what he or she sees for the first time, so the pragmatic philosopher is content to give an account of how that this is done. At the institutional level, our modern task is "less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their frictions with one another."[28]

Empirical Social Science and Interpretivism: A Beginning

In *A Theory of the Trial*, I tried to integrate what I regarded as the most reliable and often replicated conclusions drawn from the more quantitatively oriented social scientific studies of the trial. Since I argued that an adequate normative theory of the trial gives normative weight to the actual practices that make up the trial and that its justification is matter of the "mutual support of many considerations, of everything fitting together into one coherent view" it would be foolish to not to take the most secure results of the empirical findings into account.

How would empirical social scientific work fit relate to this interpretivist view? In working on an understanding of the trial, I considered the very large range of empirical social scientific studies. They were of quite different sorts, each of which had strengths and limitations. Questionaires raise issues of self-selection and perspective. Ethnomethodological studies are sometimes criticized as insufficiently rigorous: unlikely to produce falsifiable or reliably general hypotheses. In order to control variables, the more "rigorous" simulated studies are conducted under conditions so far removed from

[28] David Kolb, *The Critique of Pure Modernity*, p.259.

those prevailing in actual trials, that "literal extrapolation" actual trial would, to say the least, "be imprudent." [29]

It turned out not to be that difficult to integrate empirical work in the study I did. I found that the empirical studies of the trial contained no surprising results, and so were consistent with the account I was developing using a variant of Arendt's "linguistic phenomenology," a detailed description of what the major actors at trial actually did and the constitutive rules within which they did it. It turned out that there appeared to be no conflict between the rational reconstruction that I was attempting and the correlations or causal explanations identified by empiricists. Here is how I thought of the issue:

> This is not to say that such an integrated understanding is simple. Difficult methodological issues may prevent the integration of methods of social science research that explicitly seek to create a "scientific image" of the jury by discovering quantifiable relationships between certain bits of "jury behavior" and independent variables of one sort or another. Precisely what those independent variables are makes a great deal of difference, as does the interpretation of the relationship between those independent variables and the dependent variable (jury "behaviors") they "explain." Where the independent variable and postulated relationships are such that no normative account can be given of that same relationship, difficulties of integration into a normative account are probably insurmountable. These are cases where the independent variables cannot serve as *reasons or justifications* with a recognizable normative perspective for the results that form the dependent variables in the "scientific" account. For example, if social scientists could isolate the variable of the defendant's race and demonstrate its causal effect on verdicts, they would have identified an aspect of jury decision ripe for reform, not a defensible situated ideal. To invoke once again a distinction important within the philosophy of science, certain independent variables affecting jury behavior may provide a behavioral or causal explanation of an intellectual practice (whether a science or a trial) but not a rational reconstruction of the *validity*of the practice's results. By contrast, where such a distinctively normative account can be given, methodological problems are delicate, but not insurmountable. In fact, it turns out that most often the independent variables are capable of a normative redescription, and the notion of social scientific "explanation" invoked by the

[29] Valerie Hans and Neil Vidmar, "The American Jury at Twenty-Five Years," *Law and Social Inquiry* 16 (1991): 16.

> investigators is, to say the least, not fundamentally incompatible with a normative appreciation of the relationship between the "causal factor" and the behavior "caused." *This*, not the mere quantity or the independent variables that frustrates "cross-tabulation," is what is really "flattering to law."[30]

Thus empirical social science could serve a number of purposes within an interpretivist perspective. It could serve a positive, constructive purpose in helping us see what our *actual* practices are, rather than the possible distortions embedded in ideological accounts of the social practice. From a normative point of view, this would improve out attempts to reach a Rawlsian "reflective equilibrium," something that requires an account of actual social practices in which we have a significant amount of confidence. Those results could be drawn into "the mutual support of many considerations, of everything fitting together into one coherent view."[31] It can serve a negative purpose in illuminating those aspects of what we actually do that are inconsistent with the best interpretation of important social practices.

And on this point, I think there is again some parallel between jury operations and the relationships between normative theory, interpretive social science, and empirical social science. I argued that the key "level" of trial decision-making occurs in the choice between the fully characterized, normatively charged, narratives that the parties tell. Concretely this happens in opening statement. There will be normative, moral and political, as well as empirical reasons for choosing between them. But in making that decision, the jury will sometimes ask itself, well what *exactly* happened. They will then try to reimagine what they would have seen had they been there. This step "downward"

[30] Burns at 142-43. The last quote is from Kalven and Zeisel. The notion of a "rational reconstruction" comes from Bernstein.
[31] John Rawls, *A Theory of the Justice* at 579.

toward the perceptual will be in the interest of the larger interpretive enterprise and may be crucial within it. It will not be foundation on which interpretations are constructed. Usually it will be carried out using common sense reasoning, common sense here conceived as a storehouse of empirical generalizations about what happens "generally and for the most part."[32] Sometimes the natural and social sciences will lend a hand. But even when the jury relies on the most rigorous forms of natural scientific evidence, the weight to be given that evidence will always involve interpretive and normative judgments. Could there have been lab error? Might it have been intentional? What about the defendant's evidence? Do we have the level of certainty necessary, as a normative matter, to impose what we know to be the punishment on this defendant? And is it right to do that? After all, what is the most important aspect of this case?

Conclusion: The Critical Edge

See how I have made a problem for myself, one that was lurking all along. It is a problem for someone who seeks to interpret a tradition he stands within. Hegel could interpret history and society because he wrote from an absolute point of view. True, it was from a contemplative point of view: it did not tell us what is to be done. (And so the possibility of an Hegelian ethics that was other than an injunction to respect "my station and its duties" (Bradley) has always been problematic. Such an ethic could, like that of the later Rawls, serve the important conservative role of keeping things from getting worse, in particular, from reverting to the ethic of a less free era.) With the quick collapse of that aspect of Hegelianism, the would-be Hegelian no longer had any place to stand.

[32] Lonergan. This is a partial understanding of common sense. Heidegger.

The problem is this. Assume it is true that an adequate normative or "internal" understanding of the trial can defended only "hermeneutically," by the "mutual support of many considerations, of everything fitting together into one coherent view."[33] In Rawls' explicitly normative account, this involves reaching "reflective equilibrium" by a circular movement between highly abstract "Kantian" principles of moral equality of persons, on the one hand, and "considered judgments of justice," the socially-embodied evaluations formed under favorable conditions in which we have a highly level of confidence, on the other.[34] (This bears a very interesting relationship to Clifford Geertz's hermeneutical conception of anthropological understanding, "a continuous dialectical tacking between the most local or local detail and the most global of global structures in such a way as to bring both into view simultaneously."[35] How they differ, I will leave to another day.)

For the early Rawls, those "Kantian" principles gave him an Archimedian point from which to interpret social institutions. (That he sought to interpret all major social institutions, and I sought to interpret just one, does not change the problem, it seems to me.) Likewise, another interpretivist, Ronald Dworkin, offers to tell us what constitutional law is by interpreting it from the perspective of the best moral and political theory, which he understands to be explicitly and robustly normative. Thus either of them should easily distinguish which social scientific findings revealed real social

[33] John Rawls, *A Theory of Justice*, 579 (1971)
[34] Robert P. Burns, "Rawls and the Principles of Welfare Law,"
[35] Clifford Geertz, "From the Native's Point of View: On the Nature of Anthropological Understanding," in *Interpretive Social Science: A Reader*, ed. Paul Rabinow and William M. Sullivan (Berkeley and Los Angeles: University of California Press, 1979), 239.

practices, and which revealed the distortions of practices caused by their institutional shells, to revert to Dewey's distinction.

Is it possible to give the best interpretation of a social institution without an Archimedian point? I think the example of the trial and the continuity in the forms of interpretation between trials and accounts of trials suggests that there is. With what issues does an account of a trial, or any social practice, allow us to cope?